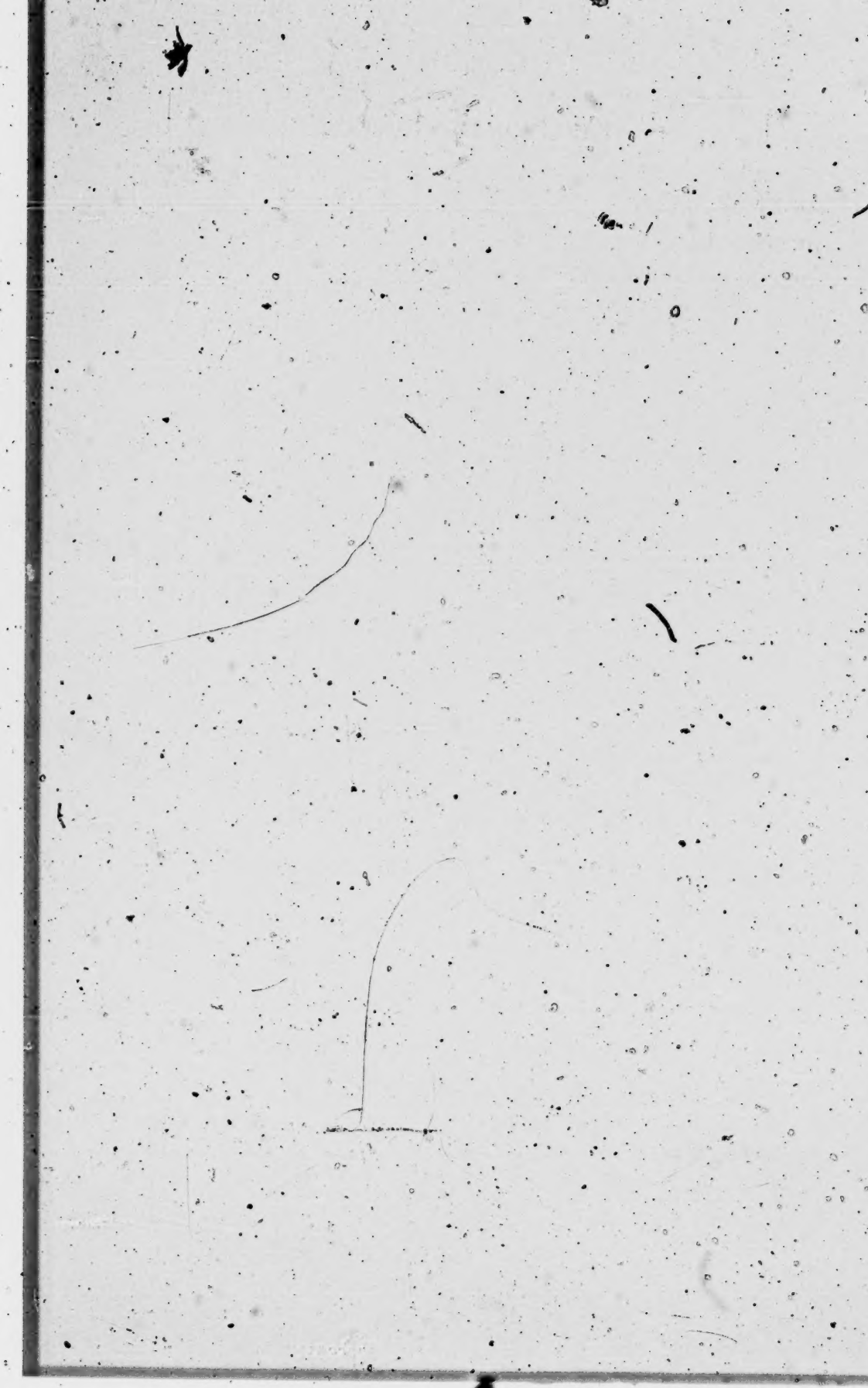


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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Nos. 71-915 and 71-973

UNITED STATES, *et al.*,

Petitioners,

v.

ROBERT W. PARKER, *et al.*,

KAIBAB INDUSTRIES, *et al.*,

Petitioners,

v.

ROBERT W. PARKER, *et al.*,

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinions of the district court (U.S. Pet. App. C, pp. 15a-30a; Kaibab Pet. App. 31-48) is reported at 309 F. Supp. 593. The opinion of the court of appeals (U.S. Pet. App. A, pp. 1a-11a; Kaibab Pet. App. 21-30) is reported at 448 F.2d 793.

JURISDICTION

The judgment of the court of appeals (U.S. Pet. App. B, 13a; Kaibab Pet. App. 49) was entered on October 1, 1971. The time for filing the petitions for writs of certiorari having been extended, the petition of the federal petitioners was filed on January 13, 1972, and that of the private petitioners on January 31, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court's finding that East Meadow Creek area is of wilderness value is supported by the evidence.

2. Whether the Secretary of Agriculture is required by the Wilderness Act to review whether national forest lands which are of wilderness value and which are contiguous to land designated as primitive should be preserved as wilderness and to report his findings to the President.

3. Whether the district court properly had discretion to issue an injunction prohibiting the Secretary of Agriculture from allowing intensive timber cutting within an area of wilderness value until he had made its own review as to whether the area should be preserved as wilderness and until the President and Congress had made their determinations.

STATUTES INVOLVED

The pertinent provisions of the Wilderness Act of September 3, 1964, 16 U.S.C. 1131-1136, and of the Multiple Use-Sustained Yield Act, 16 U.S.C. 528-531 appear in Appendix A to the petition of Kaibab Industries, pp. 1-20.

STATEMENT

Respondents brought this action on April 4, 1969, in the United States District Court for the District of Colorado to enjoin the United States and named federal officials (the federal petitioners) from selling 4.3 million board feet of timber on East Meadow Creek in White River National Forest, Colorado, to Kaibab Industries. This tract of 1200 acres is located, at its nearest point, within a mile of the Gore Range-Eagles Nest Primitive Area. Kaibab Industries was made a necessary party defendant on April 10, 1969.

Respondents alleged, *inter alia*, that federal petitioners had acted in violation of the Wilderness Act of 1964, 16 U.S.C. 1131, *et seq.*. More specifically, they alleged that the federal defendants had failed to make a study of East Meadow Creek to determine whether it should be preserved as wilderness under the Act; that the President and Congress should have an opportunity to consider the area for preservation; and that the sale of the timber would irrevocably destroy the wilderness character. The district court denied petitioners' motions to dismiss on July 31, 1969, and issued a preliminary injunction against any timber sale.

On December 24, 1969, the district court denied motions by petitioners for summary judgment, holding: (1) that it had jurisdiction over the parties and the subject matter; (2) that the action was not barred by sovereign immunity; and (3) that respondents should have an opportunity to present evidence as to the suitability of East Meadow Creek for wilderness within the definition of the Wilderness Act. 307 F. Supp. 685.

After a four-day trial, the district court found that the area has "significant wilderness resources" (U.S. App. 29a, 30a). It held that the federal defendants had violated the Act and the Forest Service's own regulations by failing to study the area for determination whether it should be preserved as wilderness (U.S. Pet. App. 24a-25a). It further held that since the cutting of timber in the area would

"frustrate the purpose of the Wilderness Act to vest the ultimate decision as to wilderness classification in the President and Congress, rather than the Forest Service and Secretary of Agriculture," the court should prohibit such cutting to protect the status quo (U.S. Pet. App. 30a). The district therefore ordered the federal defendants to make a wilderness study of the area and prohibited the sale or cutting of timber until a decision could be made by the President and Congres (Kaibab Pet. App. 51).

The Court of Appeals for the Tenth Circuit affirmed (U.S. Pet. App. 13a). It first upheld the findings of the district court of the "wilderness value" of the area (U.S. Pet. App. 6a). It then held that the Wilderness Act and regulations required the federal defendants to study the area and that, until this was done and the President and Congress had time to act, its wilderness character could not be destroyed. (U.S. Pet. App. 8a-9a).

ARGUMENT

This case involves whether a particular piece of national forest land should be considered for inclusion in the National Wilderness Preservation System. The courts below decided that East Meadow Creek should be studied by the Secretary of Agriculture so that the President and Congress could make their determination. They therefore ordered the Secretary not to permit timber cutting in the area, which would totally and irreparably destroy its wilderness character, until the determination could be made.

Respondents submit that the petitions for writs of certiorari should be denied. Petitioners do even assert that there is a conflict between the decision below and any other decisions of any court. The decision will not significantly affect the administration of the national forests except to require that the President and Congress have the opportunity to determine whether land of wilderness potential should be preserved in its natural state. And, finally, we submit that the unanimous decision of the court of

appeals, affirming the determination of the district court, is correct and should not be disturbed.

1. Petitioner Kaibab contends (Pet. 11-15) that the district court erred in finding that the East Meadow Creek area "seems to have significant wilderness resources and could be determined by the President to be predominantly of wilderness value" and that the area "meets the minimum requirements of suitability for wilderness classification" (U.S. Pet. App. 20a, 30a).

The district court heard extensive evidence concerning the area. It found that it is "thickly wooded, secluded and unspoiled"; that "a wilderness experience can be obtained in this area"; that there are deer and elk in the summer and fall; that the area "is generally untrammeled by man" except for a short access road which is blocked off, cannot be used, and as a result of the dense forest, "is substantially unnoticable from approximately 100 yards away"; and that the preservation of East Meadow Creek would be desirable because it is "geographically contingous" and is "significantly interrelated with the Gore Primitive Area" (U.S. Pet. App. 18a, 19a, 29a). The court of appeals upheld the district court's findings as "supported by the record considered under any standard of appellate review" (U.S. Pet. App. 62).

Petitioner Kaibab claims (Kaibab Pet. 11-12) that the district court's finding is in conflict with that of the Forest Service which had studied the East Meadow Creek area and concluded that it should not be preserved as a wilderness area. However, as the district court noted (U.S. Pet. App. 20a), these studies were conducted solely under the Multi-Use-Sustained Yield act, 16 U.S.C. 528-531, which involves entirely different criteria. Moreover, the district court did not rule whether the East Meadow Creek should be preserved as wilderness but only "whether there is sufficient evidence of its wilderness character so as to require study and submission to the President and Congress for determination of its character * * *" (U.S. Pet. App. 20a-21a).

Even if the Service was correct in determining that the area should not be included in the wilderness system, it was at least required to submit these findings to the President. 16 U.S.C. 1132(b).

In short, the district court properly determined, based on the evidence before it and the standards prescribed in the Wilderness Act itself, whether East Meadow Creek should be considered for possible preservation as wilderness under the procedures provided in the Act. We submit that the findings of the district court are amply supported by the evidence. In any event, they plainly do not raise an issue appropriate for review by this Court.

2. Petitioners claim (U.S. Pet. 9-12; Kaibab Pet. 7-11) that the Wilderness Act and Forest Service Manual do not require the Secretary of Agriculture to review the East Meadow Creek as to whether it should be preserved as wilderness and to report his findings to the President.

Section 3(b) of the Wilderness Act, 16 U.S.C. 1132(b), specifically requires the Secretary to review areas of national forests classified as "primitive" for possible preservation as wilderness. The Secretary's findings as to primitive areas are submitted to the President who in turn advises the Congress of his recommendations. Section 3(b). An area is not included within the wilderness system unless Congress so designates it. Section 2(a), 16 U.S.C. 1131(a). Section 3(b) of the Act further provides that:

> Nothing herein contained shall limit the President in proposing as part of his recommendations to Congress, the alteration of existing boundaries of primitive areas or recommending the addition of any contiguous area of national forest lands predominantly of wilderness value..

The courts below held that this provision, when read together with the rest of Section 3(b), requires the Secretary to review national forest land of wilderness value contiguous to primitive areas, as well as the primitive areas themselves, as to whether they should be preserved as wil-

derness. The procedures provided by the Act for determining whether national forest land should be included in the wilderness system consist of review by the Secretary, recommendation by the President, and decision by Congress. Since the Act must contemplate, as the district court said, "that the President shall be in a position to exercise a meaningful decision with respect to contiguous areas" (U.S. Pet. App. 24a), it necessarily requires the Secretary to review contiguous areas of possible wilderness value and submit his findings to the President.

The federal petitioners argue (Pet. 9-10) that "the legislative history of the [Wilderness] Act shows the intention of Congress was not to add new lands to those already removed from multiple-use management but rather that the Act's impact was to be solely upon lands already as removed." The government quotes several committee reports and statements of Congressmen that no land will be withdrawn under the Act from timber production, grazing, or mining except for lands already designated as "wilderness," "wild," "canoe" or "primitive" and therefore already withdrawn (Pet. 9-12). This legislative history, if it stated what the government claims, would be directly inconsistent with the sentence of Section 3(b) which specifically allows the President to include additional lands contiguous to primitive areas within the wilderness system. And it is of course well-established that the plain language of the statute, rather than its legislative history, must govern when the language of the act is clear. *E.g., United States v. Missouri Pac. R. Co.*, 278 U.S. 269, 278 (1929); *Kuehner v. Irving Trust Co.*, 299 U.S. 445, 449 (1937).

However, the legislative history is in fact not inconsistent with the language of the statute. First, the statements quoted by the government say no more than that the Act does not withdraw more land for wilderness purposes. This is factually correct since the Act itself included in the wilderness system only land which had already been designated

as "wilderness," "wild," or "canoe." 16 U.S.C. 1132 (a). Lands contiguous to primitive areas and even primitive areas themselves could not be preserved as wilderness unless the Congress decided to do so by passing subsequent legislation. 16 U.S.C. 1131(a), 1132(b). Consequently, the decision of the courts below simply to require consideration of East Meadow Creek so that Congress can later determine whether to withdraw it from timber production, is not inconsistent with the statements relied on by petitioners.

Second, the Wilderness Act was introduced in 1956 and was debated and rewritten over a nine-year period ending with passage in its present form in 1964. The statements to which the federal petitioners attach such importance occurred in 1961 and 1963, largely in the Senate. The 1961 debate concerned a bill which, after stating that the President can recommend the inclusion in the wilderness system of contiguous areas, included the following provision (107 Cong. Rec. 18042 (1962)):

> Provided further, That following such exclusions and additions any primitive area recommended to be continued in the wilderness system shall not exceed the area classified as primitive on the date of this Act.

Until final passage of the Act in 1964, this proviso remained in all versions considered by the Senate. S. 4, S. Rep. No. 109, 88th Cong., 1st Sess.; 109 Cong. Rec. 5943 (1963).

In 1964, however, the House Committee reported H.R. 9070 which for the first time contained the pertinent language of Section 3(b) without the Senate proviso. 110 Cong. Rec. 17449 (1964); H. Rep. No. 1538, 88th Cong. 2nd Sess., 1964 U.S. Code Cong. & Admin. News 3615. H.R. 9070 was passed by the House on July 2, 1964, with only slight changes. (110 Cong. Rec. 17547 (1964)) and was then passed without debate in the Senate (110 Cong. Rec. 20601 (1964)). Federal petitioners cite no legislative history from the summer of 1964 when the bill was actually

adopted since that history does not contradict in any way the plain meaning of Section 3(b) as it now stands.

Respondents' view of Section 3(b) is further supported by the Forest Service Manual. Section 2321(1) of these regulations provide that:

> Each Primitive Area (so classified as of September 3, 1964) and contiguous lands which seem to have significant wilderness resources will be studied to determine whether to recommend that all or part should be included in the National Wilderness System.

This provision demonstrates that the Forest Service considers Section 3(b) as requiring it to study areas of wilderness value. Its only real dispute with respondents and the courts below is whether East Meadow Creek is the kind of area as to which a study should be made and findings submitted to the President.

Even if Section 3(b) did not require review of contiguous areas of wilderness value, the Forest Service Manual contains "directives" which the Service must follow, 36 C.F.R. 200.4. This Court has held that a similar manual of the Department of Housing and Urban Development is binding upon the agency. *Thorpe v. Housing Authority*, 393 U.S. 268, 274-278 (1969).

The decision below on this issue will not substantially burden the federal defendants. They are simply required to review all national forest lands which are both contiguous to primitive areas and of wilderness value for possible inclusion in the wilderness system and submit their findings to the President. The Forest Service Manual clearly requires this action and numerous such studies have actually been conducted by the Forest Service (U.S. Pet. App. 9a, 27a, note 5; C.A. App. 771-786).

3. Finally, petitioners contend (U.S. Pet. 8, 13-14; Kaibab Pet. 10-11, 15-16) that the injunction is too broad in that it interferes with the Secretary of Agriculture in administering the national forests. We do not doubt that

the Secretary has the authority to sell timber in national forests. 16 U.S.C. 475, 476, 528. However, as we have seen, the President and ultimately the Congress have the responsibility to determine whether areas within national forests which are contiguous to primitive areas and which are of wilderness value should be preserved as wilderness.

The courts below concluded that East Meadow Creek came within the procedures provided in the Wilderness Act. Having made this determination, they properly prohibited the Secretary of Agriculture from cutting large amounts of timber in the area before the President and Congress could make their decision. If the Secretary were allowed to proceed, he would, as the court of appeals held (U.S. Pet. App. 8a), "render meaningless the clear intent of Congress expressed in 16 U.S.C. § 1132(b) that both shall have a meaningful opportunity to add contiguous areas predominantly of wilderness value to existing primitive areas for final wilderness designation."

It is true that Section 4(a)(1) of the Wilderness Act, 16 U.S.C. 1133(a)(1) provides that:

> (a) The purposes of this chapter are hereby declared to be within and supplemental to the purposes for which national forests and units of the national park and national wildlife refuge systems are established and administered and—
>
> (1) Nothing in this chapter shall be deemed to be in interference with the purpose for which national forests are established as set forth in the Act of June 4, 1897 (30 Stat. 11), and the Multiple Use-Sustained Yield Act of June 12, 1960 (74 Stat. 215).

The Multiple Use-Sustained Yield Act provides that "the establishment and maintenance of areas of wilderness are consistent with the purposes and provisions of" the Act. 16 U.S.C. 529. Therefore, it is clear that prohibiting the Secretary under the Wilderness Act from cutting timber in wilderness areas within national forests

or, as the courts below held, from cutting timber in areas which must be considered as possible wilderness areas, is not inconsistent with the statutes giving the Secretary authority for administering national forests. Indeed, if Section 4(a)(1) of the Wilderness Act were construed to allow all purposes for which the national forests are generally administered, including timber cutting, to be carried out in wilderness areas of the forests, this Section would obviously make a nullity of the entire Act.

It is of course well established that the district courts have broad discretion as to the scope of injunctions. *E.g., Watson v. City of Memphis*, 373 U.S. 526, 538 (1963); *Winston Research Corp. v. Minnesota Mining & Mfg. Co.*, 350 F.2d 134, 143 (C.A. 9, 1965). The district court here found that "the interests of the plaintiffs and the public in maintaining the status quo until the requirements of the Act have been fulfilled far outweigh this desire" to cut timber immediately (U.S. Pet. App. 30a). The district court acted well within its discretion in determining that the Secretary of Agriculture could not be allowed to destroy the wilderness character of East Meadow Creek before a determination by the proper bodies whether to preserve it as wilderness could be made.

The federal petitioners claim (Pet. 14) that this decision, if applied generally, "would seriously disrupt the management for multiple use of millions of acres of forest lands." However, the 4.75 million acres of national forest lands which the federal petitioners suggest are of wilderness value can admittedly provide only 3 percent of the timber which can be cut annually under current Forest Service practices on national forest lands and only 25 percent of the timber which can be cut in Trinity National Forest, which apparently would be the national forest most seriously affected (Pet. 15). Moreover, many of these areas are not affected by the decision below because, as the court of appeals found (U.S. Pet. App. 9a), they have been recommended by the Secretary for preservation as wilderness.

None of the lands affected by their decision have previously been harvested for timber or used for any other purposes inconsistent with their wilderness character. A delay of a few more years until the President and the Congress have had the opportunity to consider whether these lands should be preserved as wilderness would not have any significant impact. During this period, the Forest Service could permit additional cutting and recreational use on other nearby national forest lands which were plainly not suitable for consideration as wilderness. Such nearby areas could not possibly be exhausted because the Multiple Use-Sustained Yield Act does not allow cutting of all or even 75 percent of any large area of national forest land within a few years' time. If it was determined not to preserve the area as wilderness, it could then be cut or used for other national forest purposes.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petitions for writs of certiorari should be denied.

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March 1972.